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No. 833

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1944

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Appellant,
vs.
JESS G. READ, Insurance Commissioner of the State of Oklahoma; and CARL B. SEBRING, State Treasurer of the State of Oklahoma,
Appellees.

Appeal from the Supreme Court of the State of Oklahoma

Brief of Appellees

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TEXTBOOKS AND STATUTES

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STATEMENT OF THE CASE

The Statement of the Case which appears on pages 1 to 9 of appellant's brief is substantially correct and hence appellees will not burden this brief with a separate statement. However, in order to clarify the issues and to supply certain omissions in said statement we deem it necessary to make the following additional statement.

Appellees agree with the assertion of appellant (B. 2) that:

> "The discriminatory nature of the tax is admitted, which brings into focus the controlling questions, viz: *Is the tax under consideration, in substance and effect, a fee or condition precedent to admission of foreign corporations into the State and outside the guaranties of the Fourteenth Amendment*, or is it a tax that must conform to the equal protection clause of the Fourteenth Amendment?",

but take the position that said questions are not the only questions involved in this appeal (as will hereinafter be shown), and that the fact the annual privilege taxes sought to be recovered in this action were paid after, rather than before; the exercise by the appellant insurance company of the privilege of entering Oklahoma and doing business therein during the license year for which said taxes were paid, is immaterial.

In this connection it will be noted that neither the pleadings nor the quotations from appellees' brief in the Oklahoma Supreme Court which appear on pages 5 and 6 of the appellant's brief admit or state that the law levying said privilege tax was enacted for a "revenue-producing purpose", as contended by appellant, but that said law discriminated against foreign insurance companies and produced revenue in excess of the cost of administration. *The purpose of said law was to levy a tax against foreign insurance companies for the right or privilege of entering Oklahoma and doing business therein during a license year and to fix said tax in an*

amount commensurate with the privilege granted and enjoyed.

Appellees also take the position that the assertion of appellant (B. 5) that it paid the taxes involved here

> "involuntarily and pursuant to the demand of appellee, Insurance Commissioner,"

to avoid statutory forfeitures, penalties etc., is immaterial, since this action was properly brought in a state court against the State of Oklahoma under authority of Section 12665 O. S. 1931 (quoted in the first proposition of this brief) and since this court held in the case of *Great Northern Life Insurance Company* v. *Jess G. Read*, Insurance Commissioner for the State of Oklahoma, 322 U. S. 47, 88 L. ed. 781 (hereinafter referred to as the Great Northern case), that in an action so brought, the

> "petitioner was relieved of the necessity of establishing that the payment was not voluntary and obtained the advantage of a statutory lien lis pendens on the tax payment."

Appellees take the further position that there is a primary question involved in this appeal (discussed in the first proposition of our argument herein) which, although omitted in appellant's brief, we think should be called to the attention of the court, to-wit: the question as to the right of appellant under authority of Section 12665, *supra*, to sue the State of Oklahoma to recover judgment, as sought in this appeal, *in an amount in excess of the $847.18 already awarded it by the Oklahoma Supreme Court.*

While appellees realize that the question involved in this proposition, although raised by our demurrer, was not presented to or passed on by the Supreme Court of Oklahoma (and hence may not be considered in this appeal), we also realize that if said proposition is sound (as we believe) the Attorney General of Oklahoma cannot waive, either directly or indirectly, the state's immunity in relation thereto. Therefore, appellees deem it proper to call said proposition to the attention of the court.

ARGUMENT

FIRST PROPOSITION

Appellant does not have the right under the provisions of Section 12665 O. S. 1931, to sue the State of Oklahoma to recover judgment, as sought in this appeal, in excess of the $847.18 already awarded it by the Oklahoma Supreme Court.

The above proposition presents what appellees believe to be a *primary question* involved in this appeal, which, although omitted from appellant's brief, we think should be called to the attention of the court, to-wit: the question as to the right of appellant under authority of Section 12665, *supra*, to sue the State of Oklahoma to recover judgment (this action is in reality if not in name a suit against the State of Oklahoma - Great Northern case), as sought by this appeal, in excess of the $847.18 already awarded it by the Oklahoma Supreme Court. In this connection we quote Section 12665, as follows:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the law provides no appeal, *the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law*, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer *to hold such taxes separate and apart from all other taxes collected by him, for a period of 30 days* and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes, until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivisions of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

THE QUESTION ABOVE PRESENTED NECESSARILY ARISES IN THIS APPEAL, since:

(a) as stated on page 5 of appellant's brief, at the time it paid its taxes

> "it served notice of protest *according to law upon appellees.*

meaning according to the provisions of Section 12665, *supra*, which statute was held in the Great Northern case to authorize the state to be sued *as provided therein* to recover taxes paid under protest, and to be "the remedy exclusive of other state remedies."

(b) said Section 12665 provides that a taxpayer, in order to be entitled to sue the State to recover taxes deemed by him to be illegal,

> "shall pay the *full amount* of the taxes *at the time and in the manner provided by law*, and shall give notice to the officer collecting the taxes showing the grounds of complaint, and that suit will be brought against the officer for recovery of them,"

(c) the only tax sued for herein that was paid "at the time and in the manner provided by law," to-wit: on or before February 28, 1942 (36 O. S. 1941 § 104, quoted in the fourth proposition of this brief), was the $3,302.61 paid by appellant on February 26, 1942, referred to in the notice of protest set forth as Exhibit "A" (R. 7-10) of appellant's original petition herein (R. 1-13), said notice in substance stating that of said $3,302.61 payment:

> (1) the sum of $1,694.36 was a 4% tax on premiums collected by it in Oklahoma after January 1, 1941 and before April 25, 1941 (the effective date of 36 O. S. 1941 § 104, supra), and
>
> (2) the sum of $1,608.25 was a 4% tax on premiums collected by it in Oklahoma on

and after April 25, 1941 to December 31, 1941, inclusive,

(d) only one-half of said total payment of $3,302.61, to-wit: the sum of $1,651.31, was paid under protest, the protest notice stating that said amount was a tax "in excess of two per cent on all premiums collected in Oklahoma on insurance policies during the calendar year 1941", and

(e) the only part of said total payment of $3,302.61 (one-half of which was paid under protest, as aforesaid) which was *sued for* by appellant within the

"period of thirty days"

after the payment thereof, as required by Section 12665, supra, was the sum of $847.18 sued for in the first cause of action of appellant's original petition (see prayer of said petition, R. 7), same being one-half of the $1,694.36 referred to in Subdivision (1) of Paragraph (c), supra, and the exact amount of the judgment rendered in favor of appellant by the Oklahoma Supreme Court, as aforesaid, on the third cause of action of appellant's second amended petition (filed August 27, 1942), which judgment was not appealed to this court by either appellant or appellees and hence is a final judgment.

Supporting Argument

That the statements made in *Paragraphs (a) and (b), supra,* are correct, is revealed by an examination of Section 12665 and the construction thereof set forth in the Great Northern case. In this connection attention is called to the following excerpts from said case, *relating*

to the recovery of gross premium taxes for the same year that is involved here, to-wit:

> "The procedure for recovery is laid down by Section 12665, Oklahoma Statutes 1931. * * *
>
> "A suit against a state official under Section 12665 to recover taxes *is held to be a suit against the state of Oklahoma and the remedy exclusive of other state remedies. Antrim Lumber Co.* v. *Sneed, supra,* 175 Okla. at 51, 52 P. 2d at 1045. This interpretation of the Oklahoma statute by the Supreme Court of the state *accords with our view,* as set out above, of the meaning of a suit against a state. Petitioner brought this action against the collector, the Insurance Commissioner, in strict accord with the requirements of Section 12665. * * * By so doing petitioner was relieved of the necessity of establishing that the payment was not voluntary and obtained the advantage of a statutory lien lis pendens on the tax payment.
>
> "By Section 12665, Oklahoma creates a judicial procedure for the prompt recovery by the citizen of money wrongfully collected as taxes. *It is the sovereign's method of tax administration.* Oklahoma designates the official to be sued, orders him to hold the tax, empowers its courts to do complete justice by determining the amount properly due and directs its collector to pay back any excess received by the taxpayer."

That the statements made in *Paragraphs (c) and (d) supra,* are correct, is revealed by an examination of the notice of protest set forth as Exhibit "A" (R. 7-10) of appellant's original petition (said notice being also set forth as Exhibit "A" of appellant's second amended petition (R. 23-32), which notice of protest was timely filed with the Insurance Commissioner of

Oklahoma on February 26, 1942, as aforesaid. Said notice reveals a payment of $3,302.61 on that date as a 4% tax on premiums collected by appellant in Oklahoma during the period beginning January 1, 1941 and ending December 31, 1941, and states:

> "said payment includes the following amount which your protestant alleges is unconstitutional, illegal and void, to-wit:
>
> "Sixteen Hundred Fifty-one and 31/100 Dollars ($1651.31) being tax in excess of two per cent on all premiums collected in Oklahoma on insurance policies during the calendar year 1941."

Said notice further states that:

> "Demand is hereby made that said sum so paid under protest, to-wit: the sum of Sixteen Hundred Fifty-one and 31/100 Dollars ($1651.31), be repaid and refunded to the undersigned protestant.",

and that:

> "You and each of you are further notified that unless said sum so paid under protest is repaid that protestant will, *at the time and in the manner provided by law*, institute suit for the recovery of the same, or take other appropriate action to protect its legal rights and that you and each of you shall segregate said fund and *hold the same in a separate account and not pay the same into the State Treasury of this State for a period of thirty days from this date*, and that if suit be filed within such period, that such fund so segregated shall be further held pending the outcome of said suit, *all as provided by law.*"

While it is true that the notice of protest set forth as Exhibit "B" (R. 11-13) of both appellant's original

petition and second amended petition states an additional sum of $2,936.33 was paid by appellant to the Insurance Commissioner of Oklahoma under protest, it will be noted that *said amount was not so paid until March 17, 1942*, same not being paid "at the time and in the manner provided by law," to-wit: on or before February 28, 1942 (36 O. S. 1941 § 104, quoted in the fourth proposition of this brief), and hence Section 12665, *supra*, does not authorize appellant to file an action against the State to recover said amount.

That the statements made in *Paragraph (e) supra*, are correct, is revealed by an examination of the first cause of action (R 1 to 5) of appellant's original petition in the case at bar, same being the only petition setting forth a cause of action in favor of appellant and against appellees *which was filed within the "period of thirty days" authorized by Section 12665*. However, since said cause of action was in effect restated in the third cause of action of appellant's second amended petition, it remained in full force and effect, and the judgment thereunder for the sum of $847.18, referred to in said Paragraph (e), was authorized by Section 12665.

Supporting Authorities

In support of the conclusion above reached it will be noted:

(1) Statutes in derogation of sovereignty are strictly construed in favor of the State (59 C. J. 1141).

This general rule is supported by the case of *Hawks et al* v. *Walsh et al.*, 177 Okla. 564, 61 Pac. (2d) 1109, wherein it is held:

"It is universally held that statutes *permitting a state to be sued* are in derogation of its sovereignty and will be strictly construed."

(2) A general demurrer (see Paragraph 3 of Appellees' demurrer — R. 33) raises the statute of limitations, and by analogy also raises a bar to a suit against a sovereign state to recover specified taxes in relation to which there had been a failure to timely comply with the provisions of Section 12665. This is especially true where the demurrer (as here — Paragraph 2) states that the suit is without legislative consent.

In this connection it will be noted that in the case of *Antrim Lumber Co.* v. *Sneed, State Treasurer*, 175 Okla. 46, 52 Pac. (2d) 1040, cited with approval in the Great Northern case, the second paragraph of the syllabus is as follows:

"An action against the state may be maintained only when the state has given its consent thereto, *and then only at the time and in the manner and method provided by law.*"

The rule above stated as to the scope of a general demurrer, in so far as the statute of limitations is concerned, is supported by the recent case of *Weatherman, Adm'x.* v. *Victor Gasoline Co.*, 191 Okla. 423, 130 Pac. (2d) 527, wherein it is held:

"The defendant has, in addition to other questions, raised the statute of limitiations under its demurrer. This it was entitled to do under a general demurrer even without specific reference to the statute."

In the case of *Turner* v. *Pitts, Co. Treas.*, 162 Okla. 246, 19 Pac. (2d) 563, the fifth paragraph of the syllabus is as follows:

> "No amendment setting up a cause of action *not claimed in the original petition* should be allowed after the expiration of the time allowed by law to commence a suit on such claim."

(3) Where there is a variance between the allegations of a petition and an exhibit thereof (here — the notice of protest set forth as Exhibit "A"), the exhibit controls.

This general rule is supported by the case of In re Micco's Estate, 180 Okla. 183-184, 68 Pac. (2d) 789, wherein it is held:

> "This court has laid down the rule that where there is a variance between the allegations of the petition and exhibit, the exhibit must control."

Said rule is also supported by the third and fourth paragraphs of the syllabus of *Gannaway* v. *Standard Acc. Ins. Co.*, 85 Fed. (2d) 144, decided by the Circuit Court of Appeals of the Tenth Circuit, and by the first paragraph of the syllabus of *Interstate Land Company* v. *Maxwell Land Grant Company*, 139 U. S. 569-577, 35 L. ed. 278.

SECOND PROPOSITION

While a state court's interpretation as to the meaning of a state law is binding on the Supreme Court of the United States, it does not mean that said court may not exercise its independent judgment in determining whether said statute, with the meaning so given, violates the Federal Constitution.

On pages 14 to 20 of appellant's brief the above proposition is set forth, as follows:

> "This Court will accept the operation of the tax law and its characterization as determined by the state court, but will determine for itself whether, in the light of such operation, its effect would involve a violation of the Federal Constitution."

In support of the above proposition appellant cites the case of *Hanover Fire Ins. Co.* v. *Carr, County Treasurer* (hereinafter referred to as the Hanover case), 272 U. S. 494, 71 L. ed. 372 (discussed and analyzed in the fourth proposition of this brief), wherein this court laid down the following rule of law (same being quoted at the top of page 17 of appellant's brief), as follows:

> *"It is true that the interpretation put upon such a tax law of a state by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution."*

Appellant also quotes on page 17 of its brief an excerpt cited in the Hanover case from an earlier decision of this court in support of the above quoted rule of law,

but as appellees fully agree with said rule no further reference will be made thereto here.

Appellees will, however, show in the fourth proposition of this brief that under the interpretation given by the Supreme Court of Oklahoma as to the meaning of the constitutional and statutory provisions involved here said provisions, under applicable principles of law announced by this court, do not violate the Fourteenth Amendment of the Constitution of the United States as contended by appellant.

THIRD PROPOSITION

If the gross premium tax infringes upon guaranties under the Fourteenth Amendment to the Federal Constitution, it may not be validated by claims of waiver under Section 1, Article XIX of the Oklahoma Constitution, upon entry into the State, or by claim of sovereign right to exclude foreign corporations.

The above proposition, with which we agree, is set forth and argued on pages 20 to 23 of appellant's brief. It is not the position of appellees, or of the Supreme Court of Oklahoma in its decision in the case at bar, that rights guarantied to a foreign insurance company under the Fourteenth Amendment *are or can be waived* by virtue of that part of Section 1, Article 19 of the Constitution of Oklahoma which states that such companies in entering the State

> "shall agree to pay all such taxes and fees as may at any time be imposed by law,"

as such statement necessarily refers to *valid* taxes and fees.

It is appellees position, however (see fourth proposition of this brief), and that of the Supreme Court of Oklahoma in its said decision, that the annual gross premium tax involved here, *while admittedly discriminatory*, does not violate the Fourteenth Amendment of the Constitution of the United States for the reason that under the Constitution and laws of Oklahoma a foreign insurance company is only licensed to do business in Oklahoma for one license year at a time, and that the fee or tax charged such a company for the right or privilege of entering Oklahoma and doing business therein during such a license year may be in any amount that the legislature sees fit to impose.

It is appellees further position that it is immaterial as to whether said fee or tax is collected before or after the exercise of said privilege.

FOURTH PROPOSITION

The annual tax of two per cent (since April 25, 1941 — four per cent) collected on the Oklahoma premiums of foreign insurance companies is not and never has been invalid under the provisions of the Fourteenth Amendment of the Constitution of the United States by reason of the fact that a like tax is not collected on the Oklahoma premiums of competing domestic insurance companies.

On pages 23 to 47 of appellant's brief, under propositions "III" and "IV", the converse of the above proposition is presented. However, it is significant to note, as will be found by an examination of the booklet "Taxation Manual (1942-1943)," published by The

National Board of Underwriters, and of the booklet "Fees and Taxes Charged Insurance Companies," published in 1944 by the Insurance Department of the State of New York (copies of which will be furnished the court by appellees upon request), that while the gross premium tax laws of not less than 29 of the 48 states discriminate heavily against foreign insurance companies, none of said laws have ever been held to violate the Fourteenth Amendment of the Constitution of the United States.

Pertinent Constitutional and Statutory Provisions of Oklahoma

The constitutional and statutory provisions of the State of Oklahoma involved in this case are set forth (R. 52 and 53) by the Oklahoma Supreme Court in its decision in the instant case, as follows:

> "Section 1, Article 19, of the Constitution of the State of Oklahoma, provides:
>
> " 'No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.'
>
> "Section 2 of Article 19 provides:
>
> " 'Until otherwise provided by law, all foreign insurance companies * * * shall pay to the

Insurance Commissioner for the use of the State an entrance fee as follows:

" 'Each foreign life Insurance Company, per annum, two hundred dollars; * * *

" '*Until otherwise provided by law, domestic companies excepted, each insurance company*, including [fol. 187] surety and bond companies, *doing business in this State, shall pay an annual tax or two per centum on all premiums collected in the State*, after all cancellations are deducted, and a tax of three dollars on each local agent.'

"Section 10478, O. S. 1931 (first adopted in 1909), *prior to 1941 amendment*, provided:

" '*Every foreign insurance company doing business in this State* under the provisions of this article *shall, annually, on or before the last day of February, report* under oath of the president or secretary or other chief officer of such company to the insurance commissioner, *the total amount of gross premiums received in this State within the twelve months next preceding the first of January* or since the last return of such premiums was made by such company; *and shall at the same time pay* to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and *an annual tax of two per cent on all premiums collected in this State*, after all cancellations and dividends to policy holders are deducted, and an annual tax or three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or

municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State.'

"Said section, *as amended in 1941* [36 O. S. 1941 § 104], is substantially the same except the rate of premium tax is 4% instead of 2%.

"36 O. S. 1941, Section 56, provides that the Insurance Commissioner shall furnish each insurance company authorized to do business in the State blank forms upon which to make annual reports, and that such companies shall annually, on or before the last day of February, file with the Insurance Commissioner a statement under oath showing their financial condition as of December 31st of the previous year and:

"' * * * * if the Insurance Comissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, *he shall issue to said company a license or certificate of authority*, subject to all requirements and conditions of the law, to transact business in this State, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, *and said certificate shall expire on the last day of February next after its issue.* * * *' "

Administrative Interpretation and Practice of the Oklahoma Insurance Commissioner

The uniform administrative interpretation and practice of the Oklahoma Insurance Commissioner of and under the foregoing constitutional and statutory provisions since the effective date of the 1909 General Insurance Act of Oklahoma (now 36 years)), is set forth and approved in the decision of the Supreme Court of Oklahoma in the case at bar (R. 54 to 57) and in the decision of the Circuit Court of Appeals of the 10th Circuit in the Great Northern case, *supra*.

However, in order that the court may clearly understand said interpretation and practice, both as to the issuance of an original license and of licenses for succeeding years, the following explanation is set forth:

ISSUANCE OF ORIGINAL LICENSE. When a foreign insurance company desires, for the first time, to enter the State of Oklahoma and to do business therein, *it is required*:

(a) *to file* an application for a license to do business in the State to and including the next succeeding last day of February,

(b) *to file* the data required by Section 10474, O. S. 1931 (36 O. S. 1941 § 101),

(c) *to deposit* the collateral required by law,

(d) *to pay* an "entrance fee" of from $25.00 to $200.00,

(e) *to pay*, on or before the next succeeding last day of February (see "Exception" in the Appendix hereof), a tax of two per cent (now four per cent) on all pre-

miums, less proper deductions, which it received in the State after it enters the same and prior to the next succeeding first day of January *for the privilege of so entering Oklahoma and doing business therein from the date it so enters to and including the next succeeding last day of February*; and

(f) *to agree to pay* "all such [valid] taxes and fees as may at any time be imposed by law or act of the legislature."

When the requirements set forth in paragraphs (a), (b), (c), (d), (e) and (f), *supra*, have been met, the company is issued a license entitling it to enter Oklahoma and do business therein from the date of said license to and including the next succeeding last day of February. Said license remains in effect until said date, that is, unless a refusal of said company to pay valid taxes or fees imposed upon it "by law or act of the legislature," such as a refusal to pay valid ad valorem taxes on its real or personal property, "shall work a forfeiture of such license" as provided in Section 1, Article 19, *supra*.

ISSUANCE OF LICENSES FOR SUCCEEDING YEARS.

When a foreign insurance company, which has been permitted to enter the State and to do business therein during any license year, desires to enter the State and to do business therein during the succeeding license year, *it is required*, on or before the last day of February of the then current license year:

(a) *to file* an application for a license to do business in the State from the following

March 1st to and including the next succeeding last day of February.

(b) *to file* the data required by Section 10474, O. S. 1931 (36 O. S. 1941 § 101), the report required by Section 10474, *supra*, as amended (36 O. S. 1941 § 104), and the statement required by said Section 10477 (36 O. S. 1941 § 56),

(c) *to deposit* the collateral required by law,

(d) *to pay* an "entrance fee" of from $25.00 to $200.00,

(e) *to show payment* of a tax of two per cent (now four per cent) on all premiums, less proper deductions, which it received in the State during the preceding calendar year, *which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year*. Said company is *also required to pay*, on or before the last day of February of said succeeding license year, a similar tax on all premiums, less proper deductions, which it receives in the State during the preceding calendar year, *for the privilege of having been permitted to enter Oklahoma and to do business therein during said succeeding license year*, and

(f) *to agree to pay* "all such [valid] taxes and fees as may at any time be imposed by law or act of the Legislature.

When the requirements set forth in paragraph (a), (b), (c), (d), (e), and (f), *supra*, have been met, the company is issued a license entitling it to

enter Oklahoma and do business therein from March 1st of the then current year, to and including the ~~next succeeding~~ last day of February of the ensuing year. Said license remains in effect until said date, that is, unless a refusal by said company to pay valid taxes or fees imposed upon it "by law or act of the Legislature", such as a refusal to pay valid ad valorem taxes on its real or personal property, "shall work a forfeiture on such license" as provided in Section 1, Article 19, *supra*.

The Philadelphia Fire Association Case

In determining the meaning and validty of the foregoing constitutional and statutory provisions of Oklahoma, especially those that impose an annual *two per cent tax* on the Oklahoma premiums of foreign insurance companies but not on the like premiums of competing domestic insurance companies, the intention of the Constitutional Convention and Legislature of Oklahoma in respectively adopting and enacting the same should be ascertained.

In this connection it must be presumed that said Convention and Legislature in adopting and enacting said provisions in 1907 and 1909, respectively, were cognizant of the fact that the Supreme Court of the United States had theretofore held in the case of *Philadelphia Fire Association* v. *New York* (1886), 119 U. S. 110, 30 L. ed 342 (referred to on pages 35 to 39 of appellant's brief), *that a state law imposing an annual tax on the premiums collected in said state by a foreign insurance company, but not on the like premiums of a competing domestic insurance company, did not violate*

the Fourteenth Amendment of the Constitution of the United States if the tax was imposed for the right or privilege of entering the State and doing business therein during the ensuing license year.

Inasmuch as said case was (and still is) the only decision of the Supreme Court of the United States on said question, it naturally follows that the principles of law announced therein were considered in the adoption and enactment of the constitutional and statutory provisions involved here.

In fact, it is inconceivable that the Oklahoma Constitutional Convention and 1909 Legislature intended to impose said annual two per cent premium tax in such a way as to make same unconstitutional, when a way had been pointed out in said decision to make said tax constitutional.

In this connection appellees quote from the Philadelphia Fire Association case, as follows:

> "As early as 1853, the State of New York, by a statute, c. 466, required of every fire insurance company incorporated by any other state or any foreign government, as a prerequisite to doing business in the state, that it should file an appointment of an attorney on whom process was to be served, and a statement of its pecuniary condition, and procure from a designated public officer a certificate of authority stating that the company had complied with all the requisitions of the statute; and also required *the renewal from year to year* of the statement and evidence of investments; and provided that such public officer, on being satisfied that the capital of the company and its securities and investments remained secure, *should furnish a renewal of the certificate of*

authority. A violation of the provisions was made a penal offense. This act, with immaterial amendments, is still in force.

"This Pennsylvania corporation came into the State of New York [in 1872] to do business by the consent of the state, under this Act of 1853, *with a license granted for a year and has received such license annually to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute.* The state, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. *If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshhold, seeking admission, with consent not yet given.*

"The Act of 1865 [the New York retaliatory law] had been passed when the corporation first established an agency in the state. The amendment of 1875 changed the Act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore, the corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, *to the same license fee its own state might thereafter impose on New York companies doing business in Pennsylvania* [the Pennsylvania three per cent premium tax law was passed in 1873]. By going into the State of New York in 1872, it assented to such prerequisite as a condition of its

> admission within the jurisdiction of New York. It could not be of right within such jurisdiction, until it should receive the consent of the state to its entrance therein under the new provisions, and such consent could not be given until the tax, *as a license fee for the future*, should be paid." (Brackets supplied by appellees).

The above case was cited with approval in the case of *Home Indemnity Company of New York* v. *O'Brien* (C. C. A. Mich., 1939), 104 Fed. (2d) 413, apparently as authority for the proposition that a state has the power, by the passage of retaliatory legislation,

> "to protect its own domestic insurance companies doing business in other states from burdens, prohibitions and limitations placed upon them by taxes, license fees, deposits and similar measures."

In this connection it will be noted that if state laws providing for the payment by foreign insurance companies of annual discriminatory privilege taxes are illegal, as contended by appellant, it would be wholly unnecessary for other states to enact retaliatory legislation in effect providing that insurance companies domiciled in states having such discriminatory laws and desiring to do business in said "other states", must, in order to do business therein, pay similar privilege taxes in said "other states."

Oklahoma (36 O. S. 1941 § 106) has a retaliatory law containing, among others, *such retaliatory taxation provisions*, said law being treated as valid in the case of *Read Insurance Com'r.* v. *National Equity Life Insurance Co.*, 114 Fed. (2d) 977, in respect to its retaliatory *policy writing provisions.* Moreover, 40 of the 48

states have similar retaliatory laws. This is shown by the booklet "Taxation Manual (1942-1943)", heretofore mentioned.

Therefore, while Oklahoma insurance companies are favored in Oklahoma by reason of the fact that they are not required to pay said four per cent annual gross premium taxes on their Oklahoma premiums, they are required to pay similar taxes on any premiums that they may collect in 40 of the other 47 states.

Appellees will hereinafter fully show under the subhead "Annual Privilege Taxes May be Paid either Before or After Exercise of Privilege" that the mere fact the New York law required the "license fee for the future" license year *to be paid in advance*, rather than shortly after the beginning of said year, or, as here, at the end of said year, is immaterial, since the real issue involved in said case was based on the fact that the admittedly discriminatory license fee or tax there upheld *was required to be paid for the right or privilege of entering the State of New York and doing business therein for the ensuing license year*, and not on the fact that said fee or tax was required to be paid in advance.

The New York Life Insurance Company Case

The Oklahoma constitutional provisions, as well as Section 10478, O. S. 1931 (Section 6687, C.O.S. 1921), *supra*, were first construed by the Oklahoma Supreme Court, *in so far as the character of the premium tax levied thereby is concerned*, in the case of *New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County* (1932), 155 Okla. 247, 9 Pac. (2d) 936. In said case, which is referred to briefly on page

46 of appellant's brief, the court held that the *two per cent tax* on the Oklahoma premiums of the New York Life Insurance Company was a proper "license fee, or privilege tax" charged said company *"for the right or privilege to do business"* in Oklahoma.

In this connection appellees, for the information of the court, quotes certain pertinent parts of said decision, as follows:

> "Percentage on the income or receipts, by agents of foreign insurance companies, imposed for the privilege of carrying on their business, is not a tax within a constitutional sense. Desty, American Taxation, p. 229 * * *.
>
> *"The state reserves the right to prohibit foreign insurance companies from doing business within the state,* and it may regulate, prescribe, and impose any burdens, terms, or conditions it chooses, reasonable or unreasonable, *in giving its assent to such corporation to engage in business within the state.*
>
> "In the case at bar *no lump sum is designated* as a license fee or privilege tax for the purpose of transacting business within the state. It seems manifest that *a certain percent of the premiums collected by a foreign insurance company is an equitable mode of determining what burden, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state."*

It will be noted from the last paragraph above quoted that the Oklahoma Supreme Court expressly held that "no lump sum" is designated by the constitution and laws of Oklahoma "as a license fee or privilege tax *for the purpose of transacting business within the*

State." Said paragraph clearly shows that the court considered the annual two per cent premium tax set forth in the third paragraph of Section 2, Article 19 of the Oklahoma Constitution, and not the definitely fixed schedule of fees set forth in the second paragraph of said section, *as being charged for the right or privilege of entering Oklahoma and doing business therein.*

Moreover, when said court held in the above case that the payment by a foreign insurance company of said annual two per cent premium tax was not in lieu of ad valorem taxes on its personal property, and that such a company (like a competing domestic company) must pay ad valorem taxes on its personal property in this state, it was undoubtedly aware that said premium tax (there being no like or equalizing tax paid by competing domestic insurance companies), discriminated heavily against foreign insurance companies. Therefore, unless said court was of the opinion that said annual two per cent premium tax was a tax or fee for the right or privilege of entering Oklahoma and doing business therein during the year for which same was paid, it would not have considered or treated said tax as constitutional and valid. It was, therefore, necessary, and not merely *dicta*, for the court to hold that said annual two per cent premium tax was charged:

> "for the right or privilege to do business within the state."

The Lincoln National Life Insurance Company Case

In the decision of the Oklahoma Supreme Court in the above case (R. 48 to 68), hereinafter referred to as the Lincoln National case, *from which decision this appeal is taken,* the court, after quoting the Oklahoma constitutional and statutory provisions set forth in the first subhead of this proposition, and after approving the "Administrative Interpretation and practice of the Oklahoma Insurance Commissioner," as heretofore set out, held:

> *"Under the law licenses issued to foreign insurance companies expire on the last day of February next after the date of their issuance.* If the construction and interpretation by the administrative officer and the court of the constitutional and statutory provisions quoted above is permissible, there is no invalidity in the gross premium tax therein provided.
>
> "It is well settled that a state may withhold from a foreign corporation the privilege of doing business within its borders entirely. It may grant such privilege or authority on such conditions as it may deem fit. *Williams* v. *Standard Oil Company of Louisiana,* 278 U. S. 235, 73 L. ed. 287; *Hanover Fire Insurance Company* v. *Carr, Treasurer,* 272 U. S. 494, 71 L. ed. 372. *These general rules are subject to a well-settled qualification that a state may not impose conditions which require the surrender of rights guaranteed by the Federal Constitution.* The power of a state to exact a gross premium tax from a foreign insurance company for the privilege of doing business within

the state is likewise well settled. *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 30 L. ed. 342.

"*It is the contention of plaintiff* that because the gross premium tax involved is not payable and could not be computed or collected until the close of the year 1941, it cannot be held as a valid tax for the privilege of doing business in the state during that year.

"*It is not essential that a privilege tax be paid before the exercise of the privilege.* Payment may precede or follow the exercise of the privilege, depending upon which system the Legislature chooses to adopt. *Carpenter, Insurance Commissioner* v. *Peoples Mutual Insurance Company* (Calif.), 74 Pac. 2d 508; *William A. Slater Mills, Inc.* v. *Gilpatric, State Treasurer*, 117 Atl. 806; *Pacific Mutual Life Insurance Company* v. *Hobbs, Commissioner of Insurance* (Kan.), 103 Pac. 2d 854. * * *." (R. 56 and 57).

The Oklahoma Supreme Court then gave its interpretation as to the meaning of the Oklahoma constitutional and statutory provisions involved here (see excerpt quoted on page 8 of appellant's brief), as follows:

"*It is clear that payment of such tax at the end of the licensing year was intended. The reason is that the amount of such tax is dependent on the amount of premiums collected during the taxing year and could not be determined until the end of such year. The tax imposed is clearly a privilege tax. New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. 2d 936. *It is payable at the end of the year during which the privilege is granted by the State and exercised by the insurance*

company. This is in accord with the departmental construction of the law for more than thirty years. Such departmental construction does not appear to have been challenged by any foreign insurance company during the thirty-two years from 1909 until the amendment of 1941. This long-continued departmental construction should not be overturned without cogent reasons. *Glove Indemnity Company* v. *Bruce*, 81 Fed. 2d 1943; *City of Tulsa* v. *Southwestern Bell Telephone Company*, 75 Fed. 2d 343; *United States* v. *Jackson*, 280 U. S. 183, 74 L. ed. 361; *Federal Land Bank* v. *Warner*, 292 U. S. 53, 78 L. ed. 1120." (R. 59, 60).

The Oklahoma Supreme Court next proceeded to discuss (R. 60 to 62) the Hanover case, *supra*, but as said court's interpretation of the meaning of the Illinois law involved therein is not binding on this court, appellees will not burden this subhead of our brief with further reference thereto.

After completing its analysis of the Hanover case the Oklahoma Supreme Court held (see excerpt quoted on pages 8 and 9 of appellant's brief), as follows:

> "*In the case at bar, the State exacts payment on or before the last day of February of each year of a valid privilege tax, based upon gross premiums collected for the privilege of doing business in this State during the license year, expiring on the date upon which the tax was required to be paid,* and also requires a showing of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year. As we have seen, the date when the payment for the privilege of doing business in the State is required is not material. It may be before or at the end of the license year. * * *

"From the foregoing authorities we conclude that 36 O. S. 1941, Section 194, does not violate the 14th Amendment, and does not deprive the plaintiff of equal protection of the law." (R. 62, 63).

The Great Northern Life Insurance Company Case

The New York Life Insurance Company case and the Lincoln National case, heretofore discussed, are the *only decisions of the Supreme Court of Oklahoma* interpreting the meaning of the Oklahoma constitutional and statutory provisions involved in this appeal. However, said provisions were also interpreted by the Circuit Court of Appeals of the Tenth Circuit in the Great Northern case, *supra*. (Circuit Judges Phillips, Bratton and Huxman), wherein the validity of the very tax involved here was upheld in a unanimous decision affirming the decision of the Honorable Bower Broaddus, United States District Judge for the Western District of Oklahoma. While said case was dismissed by this court on purely jurisdictional grounds in an appeal therefrom reported in 322 U. S. 47, 88 L. ed. 781 (referred to in the first proposition of this brief), the interpretation of said constitutional and statutory provisions by said Circuit Court was neither approved nor criticised.

We, therefore, respectfully invite attention to the said decision of the Circuit Court *and to the fact* that in each of the three decisions interpreting the meaning of the constitutional and statutory provisions involved here (a) the interpretation is the same and (b) the conclusion has been reached that the Oklahoma premium tax is valid.

The Hanover Fire Insurance Company Case

In the case of Hanover case, *supra*, (referred to repeatedly throughout appellant's brief), the first and third paragraphs of the syllabus are as follows:

> "1. A state may not exact as a condition of a corporation doing business within its limits that its rights secured by the Constitution of the United States may be infringed.
>
> "3. An inequality between a domestic corporation and a foreign corporation with respect to the securing by it of the right to do business within the state does not come within the inhibition of the Federal Constitution against deprivation of the equal protection of the laws."

Inasmuch as the Hanover case is the decision upon which appellant places its chief reliance here, same will be fully discussed by appellees. However, before doing so we desire to call attention to the salient fact, as will hereinafter be shown, that while said case held that the *net receipt tax* of Illinois, as construed by the Illinois Supreme Court in 1923, was discriminatory and invalid, it in effect also held that the 1919 two per cent annual *gross premium tax* of Illinois (same being essentially the same as the tax involved here) was a tax paid for the right or privilege of entering said state and doing business therein for the ensuing license year, and was hence valid even though discriminatory.

Moreover, it is significant to note that while the 1919 Act was passed long after the Hanover Fire Insurance Company first entered the State of Illinois, the annual two per cent gross premium tax ..vied thereby, even though admittedly discriminatory, was held valid

as to said company under the theory that same was a tax for the right or privilege of annually entering said state and doing business therein during the ensuing license year.

In this connection the Hanover case reveals that in 1869 the State of Illinois passed a law relating to the domestication of foreign insurance companies in Illinois. Section 30 of said Act, which was immaterially amended in 1879, operated to annually levy the regular ad valorem tax on the net receipts of such companies during the prior year. Section 22 of said 1869 law provided for the admission and regulation of such a company, required local agents thereof to secure annual certificates of authority from the Director of Trade of said state showing that the company had complied with the law "which applied to it," and also required the company to pay $30.00 for its charter, $10.00 with its annual statement and $2.00 for each agent's certificate of authority. The payment of the net receipts tax provided for in Section 30 was in no way a condition precedent for said company to enter the State of Illinois and to do business therein. No similar tax was required of domestic corporations, but both foreign and domestic companies were required to pay the regular ad valorem tax upon their real and personal property.

The computation of the regular ad valorem tax in Illinois on personal property was in theory upon fifty per cent of the actual value thereof, but as a matter of practice said fifty per cent was debased to thirty per cent, hence personal property in Illinois was actually only taxed on thirty per cent of its actual value. Said net receipts tax, being considered a tax upon personal prop-

erty, was debased to thirty per cent of said net receipts and said ad valorem tax computed thereon. This procedure was followed from 1869 to 1923 (54 years), when the Supreme Court of Illinois held that said ad valorem tax should be levied upon the full amount, rather than upon the debased amount, of the net receipts of a foreign insurance company.

Prior to said holding in the year 1919, the Legislature of Illinois passed a law requiring foreign insurance companies to pay an annual *state tax* for the privilege of doing an insurance business in Illinois equal to *two per cent of the gross amount of the premiums* received thereby during the preceding year, but said law did not repeal or supersede said prior net receipts tax law.

This annual two per cent premium tax, which was levied for a purpose similar to that of the tax involved here, has never been protested by foreign insurance companies doing business in Illinois, and it is specifically stated in the Hanover case that the Hanover Fire Insurance Company had paid said tax.

It was also the contention of the Illinois court in its 1923 decision that while payment of said annual net receipts tax was *not a condition precedent* for said company to enter and do business in said state, that since its agents were required by Section 22 of the 1869 Act, to procure annually from the Insurance Superintendent a certificate of authority stating that the company had "complied with all the requirements" of said Act, and since payment of said net receipts tax was a part of said requirements, said tax was levied as compensation for the privilege of continuing "to do business in said state" and was hence valid even though discriminatory.

The Hanover Fire Insurance Company did not object to the payment of said *net receipts tax* until the Supreme Court of Illinois held in 1923, as aforesaid, that same should be computed upon the actual amount of net receipts and not upon the debased value thereof. After this decision said company refused to pay the full amount of said net receipts tax and filed action to enjoin the collection of a tax warrant therefor.

This court held on appeal that said tax, as so computed, was discriminatory and invalid. In so holding the court, after citing cases to the effect that *a state cannot as a condition precedent to the admission of a foreign corporation to do business therein validly require the corporation to surrender rights guaranteed to it by the Federal Constitution*, such as the right to remove an action brought against it in a state court to a Federal Court, had this to say in relation to the validity of State taxes under the Fourteenth Amendment:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state *for license or privilege to do business in the state* and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other tax payers of the state. *With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within*

the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind. * * *

"What, therefore, we have to decide here is whether the application of section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether under the law of 1919 the authority granted by the department of trade and commerce for which the company paid two per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character

"It is plain that compliance with section 30 is *not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this,* * * *."*

By the above language this court in effect held that while said net receipts tax, as construed by the Illinois court in 1923, was an "occupation tax" or a "privilege tax," same was not paid "for the license or privilege to do business in the state," and that the Illinois court conceded that compliance with said Section 30, to-wit: payment of said net receipts tax,

> "is not a condition precedent to permission to do business in Illinois."

This court also in effect held that said 1919 two per cent annual gross premium tax, *same being similar to the tax involved here,* was a tax for the right or privilege of doing business in Illinois for the ensuing year and hence valid. It will be here noted the court held, that while the license construed in the case of *Southern Railroad Company* v. *Greene,* 216 U. S. 400, 54 L. ed.

536, referred to on pages 38 to 43 of appellant's brief, "was indefinite", the license construed in the Hanover case "must be renewed from year to year." This is shown by the following excerpt from the Hanover case, to-wit:

> "In the Greene case the license was *indefinite*. In this case it must be *renewed from year to year*, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens."

The above quoted language is in harmony with the holding of this court in the Philadelphia Fire Association case, *supra*, and reveals that the licensing provisions of law, such as the Illinois law construed in the Hanover case, only permit a foreign insurance company to do business in the licensing state for one year. It was probably for this reason that the 1919 two per cent annual gross tax law of Illinois, which, as stated in the Hanover case,

> "* * * provided that each nonresident corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privlege of so doing, equal to two per centum of the gross amount of premiums received during the preceding calendar year on contracts covering risks within the state after certain reductions; * * *,"

was treated as valid by this court, and said annual two per cent gross premium tax, both before and since said decision, been paid without question by foreign insurance companies doing business in Illinois.

Appellees above construction of the Hanover case is in harmony with the analysis of said case by the Oklahoma Supreme Court in its instant decision (R. 60 to

62) and by the Circuit Court of Appeals of the Tenth Circuit in the Great Northern case, supra, to which anlyses the court's attention is respectfully invited.

Appellees will hereinafter show under the subhead "Annual Privilege Taxes May Be Paid Either Before or After Exercise of Privileges" that the mere fact the Illinois law required the license fee for the ensuing license year *to be paid in advance* rather than shortly after the beginning of said year, or, *as here*, at the end of said year, is immaterial, since the real issue involved in said case was based on the fact that the admittedly discriminatory license fee or tax there upheld *was required to be paid for the right or privilege of entering the State of Illinois and doing business therein for the ensuing license year*, and not on the fact that said fee or tax was required to be paid in advance.

The Shaffer Oil and Refining Company Case

The Hanover case was followed in the case of *Sneed, Treasurer* v. *Shaffer Oil and Refining Company, et al.*, (C.C.A. 8th Cir., 1929), 35 Fed. (2d) 21 (referred to on pages 42 and 43 of appellant's brief), wherein it is held that an Oklahoma law then enforced by the Oklahoma Corporation Commission, levying an annual discriminatory corporation license tax upon foreign corporations which had theretofore received (like the railway company in the Greene case, supra), an "indefinite license" to do business in Oklahoma from the Oklahoma Secretary of State, was invalid under the Fourteenth Amendment of the Constitution of the United States. Said case is not in point here since a foreign insurance company receives no license whatsoever

from the Oklahoma Secretary of State (see *State* v. *Prudential Ins. Co., et al.*, 180 Okla. 191, 68 Pac. (2d) 852), and the only license or permit it receives is a license from the Oklahoma Insurance Commissioner to do business in Oklahoma for one license year.

Annual Privilege Taxes May Be Paid Either Before or After Exercise of Privilege

By an examination of appellant's brief it will be noted that appellant apparently concedes that under the decision of the Oklahoma Supreme Court in the instant case a foreign insurance company is only licensed to do business in Oklahoma for one year at a time and that the fee or tax charged such a company for the right or privilege of entering Oklahoma and doing business therein for a license year may discriminate heavily against it in favor of a competing domestic insurance company, *but that appellant in effect contends*:

(a) That an admittedly discriminatory fee or tax, such as is involved here, *must be required* by the authorizing state law *to be paid prior* (that is, as a "condition precedent") to the issuance by the state to a foreign corporation of a license granting it the right or privilege of entering the state and doing business therein for the ensuing license year, *in order for said tax to be valid under the Fourteenth Amendment*, and

(b) That the admittedly discriminatory gross premium tax involved here *was not required* by the authorizing Oklahoma law, as construed by the Oklahoma Supreme Court, *to be paid prior* (that is, as a "condition precedent") to the issuance by the state to the Lincoln National Life Insurance Company of a license granting it the right

> or privilege of entering Oklahoma and doing business therein for the license year beginning March 1, 1942, *and that hence said tax is invalid under the Fourteenth Amendment.*

In connection with Appellant's Contention "(a)" supra, to-wit:

> "That an admittedly discriminatory fee or tax, such as is involved here, *must be required* by the authorizing state law *to be paid prior* (that is, a 'condition precedent') to the issuance by the state to a foreign corporation of a license granting it the right or privilege of entering the state and doing business therein for the ensuing license year, *in order for said tax to be valid under the Fourteenth Amendment.*",

it will be noted that if said contention is sound, a state law expressly imposing a discriminatory license fee or tax on a foreign corporation for the right or privilege of entering the state and doing business therein *for a period of either one or twenty years* would be invalid under the Fourteenth Amendment unless said law *requires* all of said fee or tax to be paid prior to the commencement of the exercise of said right or privilege.

For example, if said contention is sound, a state law would be invalid under the Fourteenth Amendment which expressly imposes a discriminatory license fee or tax of $1,000.00 on a foreign corporation for the right or privilege of entering the state and doing business therein *for a period of either one or twenty years,* if said law *provides* that one-half of said fee or tax is payable on or prior to the commencement of said period and the other one-half payable ten days thereafter.

Appellees do not believe, as stated in our analysis of the New York Life Insurance Company case and the

Hanover case, *that the mere fact that the state laws construed therein required the license fees or taxes for the ensuing license year to be paid in advance, rather than shortly after the beginning of said year or, as here, at the end of said year, was material, since the real issue involved in each of said cases was based on the fact that the admittedly discriminatory license fee or tax there upheld was required to be paid for the right or privilege of entering the state and doing business therein for the ensuing fiscal year, and not on the fact that said fee or tax was required to be paid in advance.*

That the above contention of appellant is not sound is revealed by a careful reading of the decision of this court in the Hanover case, from which it appears that *the true criterion* as to whether a fee or tax is paid by a foreign corporation for the right or privilege of entering a state and doing business therein (and hence valid even though discriminatory) is not whether said fee or tax is paid *before of after* the commencement of the exercise of the right or privilege, *but* whether said fee or tax is a

> "burden imposed by the state for license or privilege to do business in the state"

or a

> "tax burden which having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state.",

as stated by this court in the quotation from said case set forth in the subhead "The Hanover Fire Insurance Company Case" of this brief

Such a tax burden, whether by the laws of the state in question made "due and payable" before or after the beginning of the ensuing license year, is assumed by the

applicant foreign insurance company as a "condition precedent" to the issuance of a license thereto for said year.

In connection with appellant's contention "(b)", supra, to-wit:

> "That the admittedly discriminatory gross premium tax involved here *was not required* by the authorizing Oklahoma law, as construed by the Oklahoma Supreme Court, *to be paid prior* (that is, as a "condition precedent") to the issuance by the state to the Lincoln National Life Insurance Company of a license granting it the right or privilege of entering Oklahoma and doing business therein for the license year beginning March 1, 1942, *and that hence said tax is invalid under the Fourteenth Amendment.*",

it will be noted *that appellant* not only urges in support thereof its contention "(a)", *supra,* but *takes the further position* that the $200.00 annual "entrance fee" paid by a foreign life insurance company under the provisions of the second paragraph of Section 2, Article 19, *supra,* and Section 10478 O. S. 1931, as amended in 1941 (36 O. S. 1941 § 104), is the only fee or tax paid by such a company for the right or privilege of entering Oklahoma and doing business therein for the ensuing license year.

This position is in direct conflict not only with the holding of the Supreme Court of Oklahoma in the instant case but with the prior holding of said court in the New York Life Insurance Company case, heretofore discussed, where, in construing the constitutional and statutory provisions involved here, it was held:

> "In the case at bar *no lump sum is designated as a license fee or privilege tax for the purpose of transacting business within the state.* It seems manifest that a certain percent of the premiums collected by a foreign insurance company is an *equitable mode* of determining what burdens, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state."

Moreover, said annual $200.00 "lump sum" payment is not only inadequate for the privilege of doing business in Oklahoma for a year by a foreign life insurance company, but it is not commensurate to the privilege granted, since one company may do far more business in Oklahoma during a license year than another. It was probably by reason of this patent fact that the annual percentage tax on premiums was required, as stated by the Oklahoma Supreme Court in the New York Life Insurance Company case.

> "for the right or privilege of doing business within the state."

Furthermore, by an examination of 28 O. S. 1941 § 111, it will be found that foreign corporations (other than insurance corporations) desiring to enter Oklahoma and do business therein for periods ranging from twenty years to perpetual existence *are required to pay* to the Oklahoma Secretary of State an admission fee or tax commensurate to the privilege conferred, to-wit: a fee of one-tenth of one per cent of the estimated amount of capital they intend or expect to invest in Oklahoma during the then current fiscal year, and that if they thereafter invest capital in Oklahoma in excess of said estimate *they are required to pay* a like fee or tax thereon, that is,

up to an amount not exceeding the par value of their authorized capital stock

It is not reasonable to believe that the Oklahoma law makers intended to fix the admission fee of all foreign corporations, *except foreign insurance corporations*, in an amount commensurate to the privilege given and at the same time to fix the admission fee of insurance corporations at a "lump sum" not commensurate to the privilege given.

In further support of the issue involved in this subhead of appellant's brief, to-wit: that "Annual Privilege Tax May Be Paid Either Before or After Exercise of Privilege," attention is called to the fourth paragraph of the syllabus of Great Northern case, same being as follows:

> "It is not an essential of a 'privilege tax' that it be paid before exercise of the privilege, *but payment may precede or follow exercise of the privilege as the legislature chooses.*",

and to the third paragraph of the syllabus of Lincoln National case (R. 48), which provides:

> "It is not an essential of a privilege tax exacted by a state from a foreign corporation for the privilege of doing business within the state that it be paid before the exercise of the privilege. *Payment may precede or follow the exercise of the privilege.*"

CONCLUSION

In conclusion appellees desire to state that they fully agree with the proposition that a state cannot lawfully require a foreign corporation to agree to pay an invalid or discriminatory tax after it becomes and while it remains a citizen of the state. In this connection it is appellees position that the State of Oklahoma is not attempting to require appellant to pay an invalid or discriminatory tax after it becomes and while it remains a citizen of the state, to-wit: after it enters the state for a license year, *since the premium tax involved here is required to be paid by a foreign insurance company for the right or privilege of becoming a citizen of the state for said license year.*

Before closing this brief appellees desire to call attention to the fact that the gross premium tax law of Oklahoma, *unlike the net receipts tax of Illinois,* has had a uniform and continuous administrative interpretation since 1909 (36 years) and that said interpretation has been approved not only by the Supreme Court of Oklahoma in the two decisions thereof (the New York Life Insurance Company case and the Lincoln National case), which are pertinent to the issues involved here, but by the United States District Court for the Western District of Oklahoma and the Circuit Court of Appeal of the Tenth Circuit in the Great Northern Life case, *supra.*

In consideration of the propositions, above presented, appellees respectfully ask the court to affirm the decision of the Oklahoma Supreme Court herein, and to render judgment in favor of appellees and against appellant.

Respectfully submitted,

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April, 1945.

APPENDIX

EXCEPTION

If a foreign insurance company enters Oklahoma after the first day of January of a given year, for example, after January 1, 1942, and before the last day of of February of said year (February 28, 1942), to-wit: enters Oklahoma on January 10, 1942, inasmuch as no premiums would be collected by said company in this State prior to January 1, 1942, *supra*, said company could not pay a premium tax on February 28, 1942. Moreover, said company is not required by the Insurance Commissioner to pay taxes on premiums collected by it after January 10, 1942 and before February 28, 1942, or during the calendar year, until the last day of February, 1943, at which time he will require said company to pay taxes on all premiums collected thereby after it entered Oklahoma on January 10, 1942, and before January 1, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 833.—October Term, 1944.

The Lincoln National Life Insurance Company, Appellant, *vs.* Jess G. Read, Insurance Commissioner of the State of Oklahoma, et al. } On Appeal from the Supreme Court of the State of Oklahoma.

[June 11, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

The sole question presented by this appeal is whether Oklahoma has denied appellant the equal protection of the laws in violation of the Fourteenth Amendment.

Appellant is an Indiana corporation. It qualified to do business in Oklahoma in 1919 and has continued to do business there every year since then. The Oklahoma Constitution then provided, as it does now, in Article XIX, Sec. 1, that:

> "No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

Section 2, Article XIX of the Oklahoma Constitution also required all foreign life insurance companies to pay per annum an "entrance fee" of $200, and provided:

> "Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

Appellant paid the "entrance fee". It made application for a license. And it satisfied the other requirements prescribed by Oklahoma for admission to do business in the State.[1] In each

[1] See Okla. Stat. 1941, Tit. 36, §§ 47, 101.

year subsequent to 1919 it made application for a renewal license and satisfied the various requirements of the State.

When a foreign insurance company desires, for the first time, to do business in Oklahoma, it must apply for a license to expire on the last day of February next after the issue of the license and on or before such date it must pay the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma from the date of its license to and including December 31st of that year. When a foreign insurance company which holds a license to do business in Oklahoma for a particular year desires to do business there during the ensuing year, it must make application for a license on or before the last day of February of the current license year, pay the gross premium tax on premiums received in Oklahoma during the preceding calendar year, and on or before the last day of February of the ensuing license year pay the gross premium tax on premiums received by it in Oklahoma during the preceding calendar year. That is to say, the licenses issued expire on the last day of February next after their issuance; and to obtain a renewal the company must pay on or before the last day of February in each year the gross premium tax on all premiums received during the preceding calendar year. We are told by the Supreme Court of Oklahoma that that has been the uniform administrative practice of the Insurance Commissioner since 1909.

In 1941 Oklahoma enacted a law, effective April 25, which increased the 2 per cent gross premium tax to 4 per cent.[2] Okla. Stat. 1941, Tit. 36, § 104. Like the 2 per cent tax, this new tax is applicable only to foreign insurance companies, not to domestic insurance companies. Appellant reported the gross premiums collected in Oklahoma during the calendar year 1941, paid the 4 per cent tax under protest, and brought this suit to recover the amount so paid. Appellant challenged the constitutionality of both the 2 per cent and the 4 per cent tax. The Supreme Court of Oklahoma allowed recovery of the taxes paid at the increased rate on premiums collected prior to the effective date of the act,

[2] This tax together with the entrance fee and the annual tax on each agent is "in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State." Okla. Stat. 1941, Tit. 36, § 104. On a failure to pay the tax the Insurance Commissioner "shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State." *Id.*

April 25, 1941. But it disallowed recovery for the balance against the claim that the exaction of the tax from foreign insurance companies while domestic insurance companies were exempt violated the equal protection clause of the Fourteenth Amendment. — Okl. —. The case is here by appeal. § 237 Judicial Code, 28 U. S. C. § 344.

We can put to one side such cases as *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, where a foreign insurance company, having obtained an unequivocal license to do business in Illinois and built up a business there, was subsequently subjected to discriminatory taxation. In the present case each annual license, pursuant to the provisions of the Oklahoma Constitution, was granted on condition (1) that appellant agree to pay all such taxes and fees as the legislature might impose on foreign insurance companies and (2) that a refusal to pay such taxes or fees should work a forfeiture of the license. The payment of the gross premium tax on or before the expiration of the license year was always a condition precedent to the issuance of the license for the following year. Accordingly, appellant, unlike the foreign corporation in *Hanover Ins. Co.* v. *Harding, supra,* never obtained from Oklahoma an unequivocal license to do business there; it agreed to pay not only for the renewal but also for the retention of its annual license such taxes as Oklahoma might impose.

It has been held both before and after the Fourteenth Amendment that a State may impose on a foreign corporation for the privilege of doing business within its borders more onerous conditions than it imposes on domestic companies. *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Philadelphia Fire Assoc.* v. *New York*, 119 U. S. 110. But it is said that a State may not impose an unconstitutional condition—that is it may not exact as a condition an infringement or sacrifice of the rights secured to the corporation by the Constitution of the United States.[3] The argument apparently is that since appellant is entitled to the equal protection of the laws, a condition cannot be imposed which results in its unequal and discriminatory treatment.

But that argument proves too much. If it were adopted, then the long established rule that a State may discriminate against foreign corporations by admitting them under more onerous

[3] See the cases reviewed in Hanover Ins. Co. v. Harding, 272 U. S. 494, 507-508; Henderson, The Position of Foreign Corporations in American Constitutional Law (1918), ch. VIII.

conditions than it exacts from domestic companies would go into the discard. Moreover, it has never been held that a State may not exact from a foreign corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders. See *Continental Assurance Co.* v. *Tennessee,* 311 U. S. 5. That was the nature of the tax imposed in *Philadelphia Fire Assoc.* v. *New York, supra.* That company was licensed to do business in New York under a law which required it to pay such a tax as its home State might impose on New York companies doing business there. After it had qualified to do business in New York its home state exacted from foreign corporations a tax of 3 per cent on premiums received in that State. New York accordingly followed suit. The Court sustained the increased tax, saying that since the license of the foreign company was subject to the conditions prescribed by the New York statute, the amount of the tax could at any time be increased for the future. "The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given." 119 U. S. p. 119. And the equal protection clause does not require the tax or rate of tax exacted from a foreign corporation as a condition of entry to be the same as that imposed on domestic corporations. *Hanover Ins. Co.* v. *Harding, supra,* pp. 510-511.

The fact that Oklahoma collects the tax at the end of the license year is not material. That was done in *Philadelphia Fire Assoc.* v. *New York, supra.* The controlling fact is that the tax though collected later was levied upon the privilege of entering the State and engaging in business there.[4] *Continental Assurance Co.* v. *Tennessee, supra.*

Affirmed.

Mr. Justice ROBERTS dissents.

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[4] It is not contended that appellant is engaged in interstate commerce. Hence we do not have presented any question concerning the effect of United States v. South-Eastern Underwriters Assoc., 322 U. S. 533, on the problem.